



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

SERVED: April 29, 2004

Issued by the Department of Transportation
on the **29th day of April, 2004**

Application of

**AEROLANE, LINEAS AEREAS
NACIONALES DEL ECUADOR S.A.
D/B/A LAN ECUADOR**

for an exemption under 49 U.S.C. § 40109

Docket OST-2003-14291

Application of

LAN CHILE S.A.

for a statement of authorization under
14 CFR Part 212

Undocketed

ORDER

Summary

In this order we renew the exemption authority previously granted Aerolane, Lineas Aereas Nacionales del Ecuador S.A. (d/b/a Lan Ecuador) in Order 2003-3-9, and amend that authority to the extent necessary to permit Lan Ecuador to engage in scheduled all-cargo services between Ecuador and Los Angeles. We also grant the requests of Lan Chile to wet lease aircraft to Lan Ecuador in the conduct of its authorized services.

Background

By Order 2003-3-9, we granted Lan Ecuador exemption authority to engage in scheduled foreign air transportation of persons, property and mail (including all-cargo services) between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand, effective for one year through March 12, 2004. In the same order we also granted Lan Chile a statement of authorization under Part 212 to wet lease aircraft to Lan Ecuador in the conduct of Lan Ecuador's authorized services.¹

¹ Order 2003-3-9, in Docket OST-2003-14291.

Applications

On January 13, 2004, Lan Ecuador filed an application requesting that we amend the exemption authority that we granted it in Order 2003-3-9, to the extent necessary to permit Lan Ecuador to engage in scheduled all-cargo services between Guayaquil and Quito, Ecuador, on the one hand, and Los Angeles, California, on the other hand, with aircraft wet leased from Lan Chile.²

On February 24, 2004, Lan Ecuador filed an application to renew the exemption authority granted in Order 2003-3-9 to engage in scheduled foreign air transportation of persons, property and mail (including all-cargo services) between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand. Lan Ecuador requests that we renew its authority for an additional one-year period.³

Lan Ecuador states that the authorities it seeks are consistent with the Air Transport Agreement between Ecuador and the United States (the Agreement); and that it is licensed and designated by the Government of Ecuador to perform the proposed services.⁴

Responsive Pleadings

Delta Air Lines, Inc. (Delta), Continental Airlines, Inc. (Continental), and Northwest Airlines, Inc. (Northwest) each filed answers opposing the requests of Lan Ecuador and Lan Chile. Lan Ecuador filed a consolidated reply. Continental filed a surreply.⁵ No further responsive pleadings were filed.⁶

The three U.S. carriers state that we should deny the requests of Lan Ecuador and Lan Chile, or, in the alternative, limit the term of the authorities granted with no further renewals or extensions until U.S. carrier requests to conduct code-share services are

² By application filed January 13, 2004 (X-45 reference # 2004-14), Lan Chile requests a statement of authorization under 14 CFR Part 212 to wet lease aircraft to Lan Ecuador in the conduct of Lan Ecuador's proposed all-cargo services between Guayaquil/Quito and Los Angeles.

³ By application filed February 24, 2004 (X-45 reference # 2004-55), Lan Chile filed to renew its statement of authorization to wet lease aircraft to Lan Ecuador in the conduct of its authorized services.

⁴ Lan Ecuador provided a copy of a diplomatic note from Ecuador's Ministry of Foreign Relations, designating Lan Ecuador under Article 3(1) of Annex 1, Section 2(B) of the Agreement to operate two weekly all-cargo frequencies between Quito/Guayaquil and Los Angeles.

⁵ Continental's pleading was accompanied by a motion to file an otherwise unauthorized document. We will grant the motion.

⁶ By letter dated March 23, and served on all parties, Lan Ecuador and Lan Chile state that they would not respond to Continental's March 22, 2004, pleading.

granted by the Government of Ecuador.⁷ Delta notes Lan Chile's 45% ownership stake in Lan Ecuador and states that, while it has no bilateral aviation issues with Chile, it nonetheless opposes grant of Lan Chile's request because the Lan Ecuador and Lan Chile requests, are so "inseparably intertwined." The U.S. carriers also believe that we should support the aspirations of U.S. carriers and not approve the pending requests to renew and expand existing authority through the "cooperative commercial endeavor" of Lan Ecuador and Lan Chile at a time when U.S. carriers have been prevented from serving Ecuador through "cooperative codesharing agreements" with other U.S. carriers or alliance partners.⁸ The U.S. carriers note the unsuccessful efforts to date of the U.S. government, as well as their own, to secure code-share opportunities for U.S. carriers from the Government of Ecuador. The U.S. carriers state that the instant requests offer the Department an excellent opportunity to ensure progress on this issue by denying, or limiting the term of authorities granted Lan Ecuador and Lan Chile until code-share rights for U.S. carriers in Ecuador are secured.

In reply, Lan Ecuador states that opposition to its pending requests, which are fully provided for in the Agreement, continue to be based on Ecuador's alleged refusal to allow U.S. carriers to conduct extra-bilateral code-share services in the U.S.-Ecuador market. Lan Ecuador further states that (1) diplomatic channels continue to be the appropriate forum for pursuing expanded bilateral opportunities for U.S. carriers; (2) denial of, or limiting the term of bilaterally-agreed rights would be counterproductive, could lead to retaliation by Ecuador, and would be inconsistent with the Department's statutory responsibility to honor the international obligations of the United States; (3) its license and designation under the Agreement is *prima facie* evidence that renewal and amendment of its authority is consistent with the public interest; and (4) adverse action on its request would be particularly egregious in light of the fact that Lan Ecuador, the only Ecuadorian carrier currently in the market, operates 14 weekly frequencies vs. the approximately 40 weekly frequencies currently being offered by American and Continental (adding that Continental plans to add an additional seven frequencies the first week of June). Finally, Lan Ecuador states that there is little similarity between the discretionary marketing arrangements of the U.S. carriers and its wet-lease arrangement which is a requirement imposed on Lan Ecuador as a result of Ecuador's Category 2 status under the FAA's International Aviation Safety Assessment (IASA) program.

⁷ Delta recommends a term of not more than 60 days, Continental recommends fewer than 180 days and Northwest believes "only a short period of time" with a firm date for termination is appropriate.

⁸ Delta states that it would serve Ecuador through a Department-approved code-share arrangement with its alliance partner, Aerovias Nacionales de Colombia S.A. (Avianca). Continental states that Northwest and Delta would serve Ecuador by placing their codes on Continental's U.S.-Ecuador services.

In its surreply, Continental essentially reasserts arguments previously presented in its answer.

Decision

We have decided to grant the requests of Lan Ecuador to renew and amend its exemption authority to serve the United States. Specifically, we grant the request of Lan Ecuador to renew its exemption authority to engage in scheduled foreign air transportation of persons, property and mail (including all-cargo) between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand, and to amend that authority to the extent necessary to permit Lan Ecuador to engage in scheduled foreign air transportation of property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Los Angeles, California, on the other hand. In addition, we grant the requests of Lan Chile for statements of authorizations to wet lease aircraft to Lan Ecuador in the conduct of Lan Ecuador's bilaterally-authorized services.⁹ The authorities granted will be effective for one year from the service date of this order.¹⁰

We are mindful of the desires of U.S. carriers to participate in the U.S.-Ecuador market through cooperative code-share arrangements. We have urged the Government of Ecuador to afford U.S. carriers such flexibility, and will continue our efforts to secure the code-share opportunities for U.S. carriers through diplomatic channels. However, we are not persuaded that the circumstances in this case warrant denial or a more restrictive award of authority to the applicants, to allow Lan Ecuador to operate bilaterally-authorized services.

We find that approval of both Lan Ecuador's and Lan Chile's requests are consistent with the relevant bilateral agreement and in the public interest. The economic rights sought by Lan Ecuador are provided for in the Agreement and the carrier has been properly licensed and designated by its government to conduct the proposed services. Lan Ecuador can only exercise these rights by wet leasing aircraft from a Category 1 carrier because of

⁹ Because Ecuador is a Category 2 country under the FAA's International Aviation Safety Assessment (IASA) program, the authority granted Lan Ecuador has been, and will continue to be, subject to an operational condition that it wet lease aircraft from a duly authorized and properly supervised U.S. or foreign air carrier.

¹⁰ We note that this decision is consistent with our decision of last year, granting original authority to Lan Ecuador. (*See* Order 2003-3-9). It is also consistent with Department precedent affording carriers from IASA Category 2 countries economic authority to exercise bilaterally-agreed economic rights through wet lease arrangements. *See, e.g.*, Notice of Action Taken dated February 12, 2004, in Docket OST-2000-6796, renewing the exemption authority of Aerolineas Santo Domingo, S.A., a foreign air carrier of the Dominican Republic.

Ecuador's status under IASA. Lan Ecuador has chosen to seek such wet lease services from Lan Chile.

In the case of Lan Chile's related request seeking authority to wet lease aircraft to Lan Ecuador, we look at a broad range of factors, foremost of which is reciprocity. While the three U.S. carriers continue to oppose Lan Chile's request, none has shown that the Government of Chile has denied any recent requests by U.S. carriers to conduct a wet lease of the type at issue here. Nor are we persuaded that any other public interest factor warrants withholding approval. Thus, as we stated in our initial grant of authority to Lan Chile, in the circumstances presented, we are not disapproving Lan Chile as a wet lease provider from our open-skies partner Chile.

In view of the above, we find that grant of this authority is consistent with the public interest, and that our action here does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

ACCORDINGLY,

1. We renew the exemption authority granted Lan Ecuador in Order 2003-3-9, to engage in scheduled foreign air transportation of persons, property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Miami, and New York, on the other hand; and amend that authority to the extent necessary to permit Lan Ecuador to engage in scheduled foreign air transportation of property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Los Angeles, California, on the other hand, limited to two weekly frequencies;
2. The authority granted Lan Ecuador above will be subject to the attached conditions;
3. We grant Lan Chile a statement of authorization under 14 CFR Part 212 to wet lease aircraft to Lan Ecuador in the conduct of the authority granted Lan Ecuador in ordering paragraph 1 above;
4. The authority granted Lan Chile will be subject to the conditions attached and to those contained in its foreign air carrier permit (Order 87-8-55);
5. The authorities granted above will be effective for one year from the service date of this order;
6. We grant the motion of Continental to file an otherwise unauthorized document in Docket OST-2003-14291;

7. Lan Ecuador may not conduct U.S. operations with its own aircraft and crews without further order of the Department;

8. To the extent not granted or deferred, we deny all requests for relief in Docket OST-2003-14291 and Lan Chile's January 13 and February 24, 2004, requests for statements of authorization to wet lease aircraft to Lan Ecuador in the conduct of its authorized services;

9. We may amend, modify, or revoke this order at any time and without hearing; and

10. We shall serve a copy of this order on Lan Ecuador; Delta Air Lines, Inc., Continental, Airlines, Inc., Northwest Airlines, Inc., Lan Chile S.A., the Ambassadors of Ecuador and Chile in the United States, the Federal Aviation Administration (Miami IFO); and the Department of State.

By:

KARAN K. BHATIA
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

Foreign Carrier Exemption Conditions

In the conduct of the operations authorized, the foreign carrier applicant(s) shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36, and with all applicable U.S. Government requirements concerning security. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its Principal Security Inspector (PSI) to advise the PSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.